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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUBEN CHAPA, Defendant and Appellant.	E046343 (Super.Ct.No. SWF015064) OPINION

APPEAL from the Superior Court of Riverside County. Sherrill A. Ellsworth, Judge. Affirmed.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ruben Chapa was convicted of six counts of battery upon Jane Doe 1 (Doe 1), a lesser included offense of committing a lewd act upon a child, between

January 1, 2005 and September 30, 2005. (Pen. Code, §§ 242,[1] 288, subd. (a);[2] counts 1-6.) Defendant was also convicted of five counts of committing a lewd act upon a child, Doe 1, between October 4, 2003 and December 31, 2004 (§ 288(a); counts 7-11), and two counts of committing a lewd act upon a child, Jane Doe 2 (Doe 2), between September 1, 2001 and September 1, 2002 (§ 288(a); counts 12 & 13). The jury also found true the multiple-victim special-circumstance enhancements as to each count. (§ 667.61, subd. (e)(5).)

The trial court sentenced defendant to an indeterminate 15-year-to-life sentence on count 7, the principal term. The court imposed concurrent indeterminate 15-year-to-life sentences on counts 8 through 13. On counts 1 through 6, defendant was sentenced to concurrent jail terms of 180 days for each count.

Defendant contends the trial court prejudicially erred in not giving a specific acts unanimity instruction on counts 7 through 11. In addition, defendant argues his sentence under section 667.61, mandating one strike treatment, violated the ex post facto clause. Defendant also claims his sentence under section 667.61, mandating an indeterminate term for each section 288(a) conviction with a multiple-victim special circumstance, violated the ex post facto clause.

We conclude the trial court's failure to give sua sponte a specific acts unanimity instruction on counts 7 through 11 constituted harmless error. In addition, the record

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] Section 288, subdivision (a) is referred to in this opinion as section 288(a).

does not show any ex post facto sentencing violations. The judgment is affirmed.

1. Facts

Between September 2001 and September 2002, defendant molested his niece, Doe 2 (counts 12 & 13) while defendant and his family were living with Doe 2's family in Hemet. Doe 2 was seven or eight years old at the time. Because this appeal does not challenge defendant's convictions for molesting Doe 2 (counts 12 & 13), the facts concerning Doe 2 are only briefly summarized.

Doe 2

Doe 2, who was 15 years old when she testified, stated that one night, while she was lying on a bed in a dark bedroom with defendant and some of her male cousins, defendant picked up Doe 2, laid her on his chest and put his fingers inside her vagina. On another occasion, defendant grabbed Doe 2, placed her across his lap, bent her over, facing the floor, and asked her what she would do if a stranger touched her. She said she would scream and try to flee. Defendant then put his fingers inside her vagina and told her that if a stranger tried to touch her there, not to let him do it. On a third occasion, when Doe 2 was in defendant's garage on New Year's Eve, defendant placed his hand on her "vagina,"[3] over her clothes, and told her not to let anyone do that to her.

[3] Doe 2 used the word "vagina," but probably meant "genitals," because she describes external touching over her clothes, not any kind of internal penetration. Although the word "vagina" is used in the testimony, the vagina is an internal organ, defined as "[t]he passage leading from the opening of the vulva to the cervix of the uterus in female mammals." (American Heritage Dict. (4th ed. 2000).)

Several years later, on October 25, 2005, when Doe 2 was 13 years old, Doe 2 told her mother, Michelle, that defendant had molested her. At the time, defendant's family was no longer living with Doe 2's family in Hemet; they were living in Sacramento. Michelle called defendant's wife, Adrienne (Michelle's sister), who then questioned Doe 1. Doe 1 told Adrienne that defendant had molested her also. Adrienne reported the molestations to the police.

Police Officer Renee McNish testified that she interviewed Doe 2 on October 26, 2005. Doe 2 said that on two occasions defendant had rubbed her genitalia over her underwear. Doe 2 did not tell Officer McNish that defendant had digitally penetrated her vagina.

Doe 1

In October 2003, defendant began molesting his own seven-year-old daughter, Doe 1, while he and his family were living in Hemet with defendant's wife's sister, Michelle, and her family. Defendant continuously molested Doe 1 until September 30, 2005, when Doe 1 was nine years old. Counts 7 through 11 pertain to the period of time Doe 1 and her family were living in Hemet, from October 4, 2003 through December 31, 2004. Counts 1 through 6 concern defendant's subsequent molestation acts involving Doe 1, after defendant and his family moved to Sacramento.

Doe 1, who was 13 years old when she testified at trial, stated that, beginning

when she was seven years old, defendant grabbed her vagina,[4] squeezed it for a couple of seconds, and told her never to let anyone do that to her. When defendant grabbed her, she was wearing clothes and underwear. Normally, no one else was present. Doe 1 testified that defendant did this "all the time." He did it three to four times a week the entire time they lived in Hemet. He would grab her while she was in the house, including in the kitchen and living room. Doe 1 thought this was normal behavior because defendant told her all parents did it. He also told her not to tell her mother because it would cause an argument.

In addition to defendant grabbing Doe 1's genitalia, Doe 1 described a particular incident that occurred shortly before she and her family moved from Hemet to Sacramento, when Doe 1 was eight or nine years old. Doe 1 testified that one evening, while defendant was lying on the couch in the living room, Doe 1 went up to defendant to say good night. Defendant told her to lie down next to him, which she did. While Doe 1 was lying down next to defendant, he told her about rape and said there were bad people in the world. He told her not to talk to strangers. While talking to Doe 1, defendant put Doe 1's hand in his boxers, on his penis. He told her to feel it and move her hand up and down. Defendant warned her that bad people would put their penis inside her. Defendant then put his fingers inside Doe 1. Doe 1 testified that after defendant moved

[4] As with Doe 2, Doe 1 used the word "vagina," but probably meant "genitals," because she describes external touching over her clothes, not any kind of internal penetration.

her hand on his penis for a couple seconds, defendant ejaculated on her hand. Defendant told Doe 1 not to tell her mother about the incident.

Doe 1 testified that after this particular incident (the couch incident), defendant continued grabbing her genitalia several times a week while she lived in Hemet, and also after they moved to Sacramento (counts 1-6). Doe 1 said the acts in Sacramento occurred when she was 10 or 11. She was unsure whether they occurred five times a week or five times total. Defendant stopped doing it as much after they moved to Sacramento and she may have told a police officer that, when they lived in Sacramento, defendant just "grabbed [my] butt a lot," as opposed to grabbing her genitalia, as he did in Hemet.

After Doe 1 told her mother, Adrienne, about the molestations in October 2005, Adrienne took Doe 1 to the sheriff's station to report the incidents. Sacramento County Sheriff's Department Detective Tom Koontz requested Adrienne to make a pretext call to defendant. During the recorded pretext call on October 25, 2005, Adrienne asked defendant: "Why did you do that? . . . Why did you touch her like that?" In response, defendant said: "I did something wrong, okay? I did it wrong." Adrienne then told defendant Doe 1 had told her defendant had touched her vagina and made her touch his penis. Defendant denied it but, when Adrienne insisted defendant had molested Doe 1 and Doe 1 did not make it up, defendant replied: "She's not gonna make it up, mom. . . . [¶] . . . [¶] . . . If that's what she said I did, mom, the kid is not gonna lie." Defendant further added: "[I]f my little baby freakin' says that I did this, then I did it. Because she's not gonna lie. . . . I thought I dreamed this . . . ." Defendant also said he might have accidentally had Doe 1's hand touch his penis when he tapped her hand on his boxer

shorts to show her that no one should do that to her. He was trying to teach her not to let strangers touch her private areas. Defendant denied he got a "sexual thrill" from his acts.

On October 27, 2005, Forensic Interview Specialist Kimberly Berardi interviewed Doe 1. Doe 1 was 11 years old at the time. She said that defendant touched her private over her clothes and, whenever it happened, he told her not to let anyone touch her like that and to push the person away. She said defendant also grabbed her "butt" on two occasions. In addition, Doe 1 described the couch incident that occurred in Hemet. She and defendant were on the couch and defendant put her hand in his boxer shorts front pocket, on top of his penis. He talked about molesters and put his hand under her pants on the "outside" of her "private."

After Does 1 and 2 reported the molestations in October 2005, Doe 1 and her mother, Adrienne, left Sacramento and moved back to Hemet, where they lived with Doe 2's family for a few months.

Doe 1 acknowledged at trial that it was not until a few days before the trial that she told anyone, other than a friend and Doe 2, that defendant had digitally penetrated her and had committed the masturbation acts while she was on the couch with him. Doe 2 also did not tell anyone that defendant had digitally penetrated her until a few days before the trial.

2. Unanimity Instruction

Defendant was charged with 11 counts of committing a lewd act upon a child, Doe 1, in violation of section 288(a). Counts 7 through 11 were for lewd acts committed while defendant and Doe 1 lived in Hemet, from October 4, 2003 through December 31,

2004. Counts 1 through 6 were for lewd acts committed later, from January 1, 2005 through September 30, 2005, while defendant and Doe 1 lived in Sacramento. As to each of counts 1 through 6, the jury found defendant guilty of the lesser included offense of battery. (§ 242.)

Defendant contends the trial court's failure to give sua sponte a specific acts unanimity instruction on counts 7 through 11, constituted prejudicial error. The trial court did not give either a standard specific acts unanimity instruction, such as Judicial Council of California Criminal Jury Instructions, CALCRIM No. 3500, or a modified unanimity instruction, such as CALCRIM No. 3501.

In a criminal case, a jury verdict must be unanimous. The jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When "the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*Ibid.*)

In child sexual molestation cases involving minors and repeated identical offenses, the unanimity rule has been refined: "In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.

"As previously stated, even generic testimony describes a repeated series of *specific*, though indistinguishable, acts of molestation. [Citation.] The unanimity instruction assists in focusing the jury's attention on each such act related by the victim and charged by the People. We see no constitutional impediment to allowing a jury, so

instructed, to find a defendant guilty of more than one indistinguishable act, providing the three minimum prerequisites heretofore discussed are satisfied." (*People v. Jones* (1990) 51 Cal.3d 294, 321 (*Jones*).) The three prerequisites include generic evidence describing (1) the type or kind of acts committed, (2) the number or frequency of the acts committed, and (3) the general time period in which these acts occurred. (*Id.* at p. 316; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 (*Matute*).)

Here, there was both generic testimony describing a repeated series of specific, though indistinguishable, acts of molestation (the grabbing acts) and evidence of a single incident involving a different type of molestation (the couch incident). The court in *Jones* explained that: "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*Jones, supra,* 51 Cal.3d at pp. 321-322.)

Citing *People v. Smith* (2005) 132 Cal.App.4th 1537 (*Smith*) and *People v. Baughman* (2008) 166 Cal.App.4th 1316 (*Baughman*), defendant argues the trial court was required to give a specific acts unanimity instruction because the People presented evidence of more than one type of lewd act committed in Hemet. Not only was defendant accused of grabbing Doe 1's genitalia on a regular basis but, in addition, there

was evidence that on one occasion defendant committed other types of lewd acts while on the couch with Doe 1 at their home in Hemet.

In *Smith, supra,* 132 Cal.App.4th 1537, the defendant was charged with 10 counts of molesting the victim. The charged crimes included three different types of molestation. The jury convicted the defendant of only one count. The trial court rejected the defendant's request for a specific acts unanimity instruction. (*Id.* at pp. 1542-1543.) Instead, the court gave a modified version of the unanimity instruction, CALJIC No. 4.71.5, in which the court instructed the jury that in order to find the defendant guilty, the jury had to agree unanimously that the prosecution proved the defendant committed all the acts described by the victim. (*Smith, supra,* at p. 1543.)

The *Smith* court concluded the modified instruction did not comply with *Jones* because the evidence "sufficiently differentiated between different types, locations, and episodes of molestation as to which a jury might (and here did) disagree as to the particular acts constituting the crime defendant is convicted of committing. Consequently, the trial court erred when it failed, in conformity with *Jones*, to give a specific acts unanimity instruction in addition to an instruction allowing a conviction if the jurors unanimously agreed 'the defendant committed all the acts described by the victim.'" (*Smith, supra,* 132 Cal.App.4th at p. 1544, quoting *Jones, supra,* 51 Cal.3d at pp. 321-322.)

The Judicial Council jury instructions which provide instruction on unanimity,

similar to CALJIC No. 4.71.5,[5] include CALCRIM No. 3500 (specific acts unanimity instruction)[6] and CALCRIM No. 3501 (generic acts unanimity instruction).[7]

The Bench Notes for CALCRIM No. 3500 state: "The court has a *sua sponte* duty to give a unanimity instruction if the prosecution presents evidence of multiple acts to prove a single count. [Citations.] The committee has addressed unanimity in those instructions where the issue is most likely to arise. If a case raises a unanimity issue and other instructions do not adequately cover the point, give this instruction. [¶] The

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[5] CALJIC No. 4.71.5 states: "Defendant is accused [in Count[s] ____] of having committed the crime of _____, a violation of section ____ of the Penal Code, on or about a period of time between ____ and ____. [¶] In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of [a specific act [or acts] constituting that crime] [all of the acts described by the alleged victim] within the period alleged. [¶] And, in order to find the defendant guilty, you must unanimously agree upon the commission of [the same specific act [or acts] constituting the crime] [all of the acts described by the alleged victim] within the period alleged. [¶] It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict."

[6] CALCRIM No. 3500 states: "The defendant is charged with _____ <*insert description of alleged offense*> [in Count ___] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

[7] CALCRIM No. 3501 states: "The defendant is charged with _____ <*insert description[s] of alleged offense[s]*> [in Count[s] ___] sometime during the period of _____ to _____. [¶] The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense]; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged]."

Supreme Court has stated the rule as follows: '[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.'"

CALCRIM No. 3501, which is similar to the modified version of CALJIC No. 4.71.5, provides instruction on unanimity when there is generic evidence of the charged offenses, such as in the instant case in which Doe 1 testified that defendant grabbed her in the same manner on numerous occasions.

Here, there was both generic testimony of multiple incidents of defendant grabbing Doe 1's genitalia and specific, detailed testimony of the couch incident involving molestation acts differing from the grabbing incidents. The jurors thus could have disagreed over which acts supported the lewd conduct crimes charged in counts 7 through 11. The trial court was thus required to give a specific acts unanimity instruction.

As in *Smith, supra,* 132 Cal.App.4th 1537, in *Baughman, supra,* 166 Cal.App.4th 1316, which is also inapposite, the trial court gave a modified unanimity instruction requiring the jury to agree unanimously that the defendant committed all of the acts described by the victim in order to find the defendant guilty of each of the charged sexual offenses. The defendant argued the unanimity instruction was inadequate because the court failed to give a specific acts instruction. (*Id.* at p. 1320.)

The *Baughman* court concluded the unanimity instructions were more than sufficient. (*Baughman, supra,* 166 Cal.App.4th at p. 1321.) Although the specific acts version of CALJIC No. 4.71.5 may have been more appropriate as to one of the counts,

the jury was faced with either believing the victim or the defendant and the trial court informed the jury of the requirement of unanimity. The *Baughman* court noted that the trial court told the jury it had to agree unanimously that defendant committed all of the acts described by the victim, which was a much heavier burden than requiring unanimous agreement on any particular act. (*Baughman, supra,* at p. 1321.)

Here, unlike in *Baughman*, the trial court did not give either the specific acts unanimity instruction or the modified unanimity instruction. Rather, it merely gave CALCRIM Nos. 3515 and 3550, in which the jury was told it had to "consider each count separately and return a separate verdict for each one" (CALCRIM No. 3515), and the jury's verdict on each count must be unanimous (CALCRIM No. 3550).

Even though the trial court erred in not giving a specific acts unanimity instruction, such error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). As we explained in *People v. Wolfe* (2003) 114 Cal.App.4th 177 (Fourth Dist., Div. Two) (*Wolfe*), the *Chapman* harmless error analysis applies because "'[t]h[e] requirement of unanimity as to the criminal act "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." [Citation.]' [Citations.] When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors (as required by state law) are not convinced that the defendant is guilty of any one criminal event (as defined by state law). This lowers the prosecution's burden of proof and therefore violates federal constitutional law. [Citations.]" (*Wolfe, supra,* at pp. 187-188.)

Under *Chapman*, "'we must ultimately look to the *evidence* considered by defendant's jury under the instructions given in assessing the prejudicial impact or harmless nature of the error.' [Citation.] '[W]e must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction. [Citation.]' [Citation.]" (*Wolfe, supra,* 114 Cal.App.4th at p. 188, quoting *People v. Harris* (1994) 9 Cal.4th 407, 428-429.)

We conclude, as in *Matute, supra,* 103 Cal.App.4th at page 1450, a child molestation case, that the trial court's failure to instruct the jury properly on unanimity was harmless error under *Chapman*. In *Matute,* the court held that generic testimony, consisting of the victim's testimony that the defendant raped her a couple of times a month initially and then, later, a couple of times a week, for about four years, was sufficient to support convictions for 15 counts of forcible rape. (*Matute, supra,* at p. 1446.) The *Matute* court further held the trial court erred in failing to give sua sponte a modified unanimity instruction. (*Id.* at p. 1448.) Applying the *Chapman* harmless error standard, the *Matute* court held that such omission, however, was harmless error. (*Matute, supra,* at p. 1450.)

The *Matute* court based its harmless error holding on the following factors. The trial court had instructed the jury pursuant to CALJIC No. 17.02 (the equivalent of CALCRIM No. 3515) that the jury must decide each count separately. The trial court further instructed that all 12 jurors must agree to the decision (the equivalent of CALCRIM No. 3550). (*Matute, supra,* 103 Cal.App.4th at pp. 1449-1450.) In addition,

during closing argument, the prosecutor explained to the jury that the number of counts of rape was based on evidence that, over the 15-month period at issue, the defendant raped the victim at least once every month. (*Id.* at p. 1449.) The *Matute* court concluded the prosecutor made it clear the jury was being asked to find that the defendant raped the victim 15 times over the 15-month period at issue. (*Ibid.*) The *Matute* court also noted that the defendant's only defense was that he did not have sexual intercourse with the victim, which the jury rejected. (*Id.* at p. 1450.) Based on these factors, the *Matute* court was "convinced beyond a reasonable doubt the jury unanimously agreed that the charged crimes took place in the number and manner described even without the submission of CALJIC No. 4.71.5." (*Ibid.*)

Here, as in *Matute*, the trial court instructed the jury that: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." (CALCRIM No. 3515.) The trial court further instructed the jury that: "Your verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must agree to it." (CALCRIM No. 3550.)

In addition, both defense counsel and the prosecutor told the jurors they must agree unanimously as to which acts constituted the offenses charged. During closing argument, the prosecutor told the jury: "You have to agree which acts constitute these charges. You have a lot to choose from. You have to unanimously make those decisions. I submit to you there could be a hundred charges he's faced with. There are at least these 11 times on (Jane Doe 1) . . . ." The prosecutor also told the jury that the evidence

established defendant committed two types of lewd acts against Doe 1, the grabbing acts and the acts occurring on one occasion, while defendant and Doe 1 were lying on the couch. The prosecutor urged the jury to find the couch incident constituted one count of molestation and find that the other four counts consisted of four instances of defendant grabbing Doe 1's genitalia.

Defense counsel told the jury during closing argument that, in order to find defendant guilty, the jurors had to "agree which 13 acts at which time and so forth in order to say he's guilty." Defense counsel further stated the jury had to find that the prosecution had proven each of the three elements of a section 288(a) offense, including a finding defendant had the specific intent to sexually arouse himself or the victim. "And so for each one, each of the 13 ones, you have to all agree that I think he touched (Jane Doe 1) on the butt and I think that appealed to him and gratified him in a sexual desires [*sic*]."

As in *Matute, supra,* 103 Cal.App.4th 1437, here, there also was evidence of far more incidents of defendant molesting Doe 1 than the five counts (counts 7-11) for which defendant was convicted. In addition to the couch incident, Doe 1 testified defendant committed the grabbing conduct three to four times a week for over a year, while they lived in Hemet.

In addition, as in *Matute*, this case turned on whether the jury believed defendant's version or Doe 1's version of the facts. Defendant claimed he did not intend to arouse Doe 1's or his own sexual desires during the couch incident or when he grabbed Doe 1. Defendant also argued Doe 1 made up the digital penetration and masturbation

allegations. Since there were no witnesses to the alleged offenses, this case turned on whether the jury believed defendant's version or Doe 1's version of the facts. The verdicts, in which the jury found defendant guilty of all of the Hemet charges (counts 7-11), show that the jury believed Doe 1, rather than defendant.

We recognize *Matute* differs from the instant case in that, here, there was both generic testimony regarding ongoing similar molestation acts and evidence of a specific incident involving a different type of molestation. Nevertheless, we conclude the failure to instruct properly on unanimity was harmless error based on many of the same reasons the court in *Matute* held the instructional error was harmless. As in *Matute*, we "conclude no miscarriage of justice occurred here. It is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the instructional error because there is no reasonable possibility the jury failed to unanimously agree that appellant committed each specific act for which he was convicted." (*Matute, supra,* 103 Cal.App.4th at p. 1450.)

Although in *Smith, supra,* 132 Cal.App.4th 1537, the court held that the trial court's failure to give a specific acts unanimity instruction constituted prejudicial error (*id.* at p. 1547), *Smith* is distinguishable from the instant case. In *Smith*, the verdicts on 10 charged counts reflected that the jury disregarded the trial court's modified unanimity instruction and the prosecutor's argument by finding the defendant guilty of only one count, unable to reach a verdict on a second count, and not guilty on the remaining eight counts. This meant the jury did not follow the instruction that to return a guilty verdict

the jurors had to agree unanimously that the defendant committed all the acts described by the victim.

The *Smith* court concluded that the error in failing to give a specific unanimity instruction was prejudicial because the not guilty verdicts as to eight counts could be rationally attributed to the jury concluding that the victim's generalized recollection of the molestations was insufficient to meet the standard of proof beyond a reasonable doubt. (*Smith, supra,* 132 Cal.App.4th at 1547.)

Here, the opposite is the case. The jury in the instant case found defendant guilty of all five counts. The verdicts thus could be rationally attributed to the jury finding defendant committed lewd acts based on Doe 1's generalized testimony of the numerous grabbing acts and this was sufficient to meet the *Chapman* harmless error standard. Even if the court had given proper unanimity instructions, it is reasonably probable the jury would have found defendant guilty of committing all five counts. The jurors could not have found all five counts based solely on acts occurring during the couch incident, since it involved one incident and arguably not more than a couple of separate acts. In fact, the prosecutor urged the jurors during closing argument to find the couch incident constituted the basis for only one of the counts and to find the other four counts were based on the grabbing acts.

Even if the jurors found that, during the couch incident, defendant committed several separate molestation acts supporting more than one count, such as the digital penetration and masturbation acts, the evidence of the couch incident did not establish five separate molestation acts. As a consequence, it is reasonably probable, if not

indisputable, that the jury unanimously agreed that at least one of the five counts was based on a grabbing act. That being the case, we can rationally conclude that, if the jury agreed at least one grabbing act supported a section 288(a) conviction, then the jury would have agreed that defendant committed numerous similar grabbing acts on more than five occasions. There thus was no danger that defendant was convicted where there was no single offense which all the jurors agreed the defendant committed. (*Wolfe, supra,* 114 Cal.App.4th at p. 187.)

We conclude that had the trial court given the proper unanimity instruction requiring the jury to agree on each act that formed the basis of the five convictions, beyond a reasonable doubt, the jury would have unanimously found defendant guilty of each of the five section 288(a) counts based on Doe 1's generic testimony that defendant had grabbed and squeezed her genitalia three to four times a week during the 14-month period defendant and Doe 1 lived in Hemet. The number of acts far exceeded the five counts. We thus conclude any error in not properly instructing the jury on unanimity as to counts 7 through 11 was harmless error under *Chapman*.

3. Ex Post Facto Sentencing Error

Defendant argues his sentence violates the ex post facto clause of the federal and state Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Both Constitutions' ex post facto clauses are construed similarly. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167 (*Delgado*).) We thus refer to them both as a single constitutional provision.

Defendant raises two ex post facto sentencing challenges. In both instances he argues the trial court erred in sentencing him under the one strike law (§ 667.61) in effect

at the time of sentencing in September 2008 (current version),[8] rather than under the former version of section 667.61 in effect at the time of defendant's commission of the crimes (former version).[9] The charged crimes were committed during the period of September 2001 through September 2005.

A. The Ex Post Facto Clause

Under the ex post facto clause, any statute which makes more burdensome or increases the punishment for a crime after its commission is prohibited as ex post facto. (*Delgado, supra,* 140 Cal.App.4th at p. 1164.) A law violates the ex post facto clause if it is retrospective; "'that is, "it must apply to events occurring before its enactment"—and it "must disadvantage the offender affected by it" . . . by altering the definition of criminal conduct or increasing the punishment for the crime . . . .' [Citation.]" (*Ibid.*)

B. Elimination of Discretionary Probation

Defendant contends the trial court's imposition of mandatory indeterminate life sentences on counts 7 through 13 under the current versions of sections 667.61 and 1203.066 violated the ex post factor clause. We agree the current versions of sections 667.61 and 1203.066 increased the punishment for defendant's crimes by eliminating the trial court's discretion to grant probation. (*Delgado, supra,* 140 Cal.App.4th at pp. 1169-1170.) As the court in *Delgado* explained: "[C]hanges in sentencing rules can violate the ex post facto clause when the rules sufficiently circumscribe judicial discretion, even if

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[8] Statutes 2006, chapter 337, section 33 (effective Sept. 20, 2006).

[9] Statutes 1993-1994, First Extraordinary Session, chapter 14, section 1, pages 8570 through 8572; Statutes 1998, chapter 936, section 9.

the change does not automatically lead to a more onerous result than what would have occurred under the prior law." (*Id.* at p. 1169, fn. omitted.) The *Delgado* court also noted: "It is true that the granting of probation is an act of grace and clemency rather than a right given to a defendant. [Citations.] Nevertheless, statutory changes that retroactively impose greater punishment in probation cases violate the ex post facto clause." (*Id.* at p. 1170.)

Here, the current version of section 667.61 increased the measure of punishment by eliminating the trial court's discretion to grant probation. Under the current version, probation was prohibited. During the period of time defendant committed the charged offenses, between September 2001 and September 2005, the applicable portion of section 667.61 in effect provided that the one strike law applied to section 288(a) violations, unless defendant qualified for probation under subdivision (c) of section 1203.066. (§ 667.61, subds. (b), (c)(7).)

Former subdivision (c) of section 1203.066[10] stated that probation was permissible if the court found the following: (1) the defendant is the victim's natural parent; (2) granting probation is in the child's best interests; (3) rehabilitation of the defendant is feasible; (4) the defendant is removed from the victim's home; and (5) there is no threat of physical harm to the victim. Section 1203.066 was amended in October 2005 to preclude probation if the multiple-victims allegation was found true, as in the instant case. (§ 1203.066, subd. (a)(7).)

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[10] Statutes 1997, chapter 817, section 13.

Defendant argues that because the trial court did not specify that it was relying on the one strike law in effect at the time of the crimes, the court erroneously sentenced defendant under the current version of section 667.61, in violation of the ex post facto clause. Defendant contends that, as a consequence, the trial court did not consider granting him probation instead of a one strike sentence.

Even though we agree retrospective application of the one strike law in effect at the time of sentencing would constitute an ex post facto violation, defendant has not established there was an ex post facto violation in the instant case. The record does not show that the court relied on the current versions of sections 667.61 and 1203.066 when it sentenced defendant.

We therefore must presume the trial court knew and followed the correct sentencing law, which was the version of the one strike law in effect at the time defendant committed the crimes. (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644.) The record being devoid of any affirmative showing of error, this court cannot find there was sentencing error.

The record shows that, on July 25, 2008, the trial court denied defendant probation and sentenced him on counts 7 through 13, under section 667.61. With the section 667.61, subdivision (e)(5) enhancement, the court imposed concurrent 15-year-to-life sentences for each section 288(a) offense, with count 7 serving as the principal term. During the sentencing hearing, the court explained that it was imposing a relatively light sentence because defendant had expressed remorse and he was being given a chance to change. Therefore, rather than imposing consecutive sentences, the court imposed

concurrent sentences. The court noted that in determining whether to impose concurrent or consecutive sentencing, it reviewed the probation report and discussed the matter in chambers with counsel.

The probation report sentence recommendation appears to be based on the current version since it states that under sections 667.61, subdivision (h) and 1203.066, subdivision (a)(7), probation was prohibited. The probation report further states that the court was statutorily required to sentence defendant to state prison under sections 667.61, subdivision (h) and 1203.066, subdivision (a)(7). During sentencing, however, the trial court did not state it was adopting such conclusions or that the court was relying on the current versions of sections 667.61 and 1203.066.

The court's comments during the sentencing hearing reveal that, even assuming the court was aware it had the discretion to impose probation, it would not have done so because it found defendant's crimes heinous. The court stated it was not going to allow defendant to "gloss over" that fact because defendant demonstrated criminal sophistication, he took advantage of a position of trust, and the victims were particularly vulnerable, given their young ages. The court said it therefore intended to impose a prison sentence that would impress upon defendant the severity of the impact of defendant's crimes on the victims. The court made it clear defendant's crimes warranted a prison term, not probation.

C. Imposition of Multiple Indeterminate Sentences

Defendant argues that his 15-year-to-life sentences for counts 7 through 11, with the multiple-victim enhancements (§ 667.61, subd. (e)(5)), also violated the ex post facto

clause because sentences were based on the version of section 667.61 in effect at the time of sentencing, rather than subdivision (g) of section 667.61 in effect at the time of the crimes. Subdivision (g) was eliminated from the current version of section 667.61.

Under the former version of section 667.61, subdivision (g), imposing an indeterminate sentence on each count was not mandatory. Rather, the court could have found counts 7 through 11 occurred on a single occasion or less than five separate occasions. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 865, 874-884.) Former subdivision (g) provided that a one strike sentence "shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion." (§ 667.61, subd. (g).) Under this provision, when it cannot be determined from the record whether the jury's verdicts are based on the same or different occasions, the court must assume the jury found the offenses occurred on a single occasion and impose a single indeterminate sentence. (*People v. Coelho*, *supra*, at pp. 865, 884-886.)

Defendant argues that since it was unclear from the jury verdicts whether the jury based its five guilty verdicts on counts 7 through 11 on all or some of the separate acts occurring during the couch incident and/or on the separate grabbing acts, under former section 667.61, subdivision (g), the court was required to impose a single indeterminate sentence for the five counts.

As discussed in the preceding section, we must presume the trial court applied the correct sentencing statute, former Penal Code section 667.61, since the record does not provide any basis for concluding the contrary. (Evid. Code, § 664; *People v. Coddington*, *supra*, 23 Cal.4th at p. 644.)

Applying the former version, the trial court nonetheless would have reasonably found that the jury's verdicts on counts 7 through 11 were based on molestation occurring on five separate occasions since the prosecutor urged the jury during closing argument to treat the couch incident as a single offense and base the other four counts on separate grabbing incidents; one count for each year the family lived in Hemet. In addition, the jury instructions made no reference to parsing the couch incident into separate acts supporting separate guilty verdicts.

We conclude that, under such circumstances, there was no violation of the ex post facto clause.

4. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.